IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WENDEL WAYNE JOHNSON, Appellant.	No. 37414-5-II UNPUBLISHED OPINION

Bridgewater, P.J. — Wendell Wayne Johnson appeals from two convictions of first degree rape of a child, arguing that (1) the trial court improperly commented on the evidence when it instructed the jury twice that it was not necessary for the alleged victim's testimony to be corroborated in order to convict, and (2) his trial counsel was ineffective in failing to object to various testimony. In a statement of additional grounds (SAG),[1] Johnson argues that his trial counsel was ineffective for declining to offer certain evidence at trial. We affirm.

FACTS

In 2005, Kristen Dillon disclosed to a counselor in Alaska that she had been sexually

[1] RAP 10.10.

abused several years earlier by a man who shared a duplex with her and her mother in Vancouver, Washington. Dillon was 17 years old when she reported the abuse, which occurred when she was 6 or 7. Dillon underwent a medical examination with Dr. Amy Dressel, who discovered scarring on Dillon's hymen consistent with prepubescent sexual penetration. After the Juneau police learned that Wendel Johnson was the man who had lived at the duplex, the State charged Johnson with four counts of first degree rape of a child.

At trial, the State called Detective Carolyn Bull from the Clark County Sheriff's Office to authenticate the Juneau police findings, including that Johnson lived at the duplex when Dillon also lived there. On direct examination, Bull testified:

> Q. And so when you received [the case], had the interviews already been done?
> A. The – yes.
> Q. As far as they had – the *victim interview* had been done and some follow-up had been done?
> A. Right. . . .
> Q. . . . what did you do when you received the case?
> A. Well, I reviewed the information that they gave me, which was a videotape and audiotape of the *victim interview*, and then the attached incident reports that they gave me.

I RP at 116-17 (emphasis added). Defense counsel did not object to this testimony.

When asked where she was employed, Bull testified that she was "currently assigned as a detective at the Children's Justice Center [CJC], which used to be the Children's Abuse Intervention Center." I RP at 114. As part of that assignment, Bull had received about 350 hours of specialized training in interviewing children regarding crimes against them. She completed over "three tours" at the CJC over about eight years. I RP at 114. Cases came to the CJC from

Child Protective Services or other law enforcement agencies. Defense counsel did not object to any of this testimony.

The State also offered testimony by Dr. Amy Dressel, a general pediatrician who also occasionally saw child patients that "have had suspicion of abuse, neglect, [or] harm" at the Safe Advocacy Center in Juneau. II-A RP at 138. Dr. Dressel testified that she examined Dillon in 2005 because "[s]he talked about that she was having memories of having a history of abuse when she was younger." II-A RP at 140. According to Dr. Dressel, Dillon told her:

> [T]hat when she was six or seven, she'd been living in Oregon with her mother, and that she'd been sharing a duplex with a landlord who was managing the house, and her mom was working nights. And the man who was taking care of the – the landlord that was taking care of the house at the time spent some time taking care of her, and eventually began fondling her, and then eventually did penetrate her vagina with his penis.

II-A RP at 140-41. Defense counsel did not object to this testimony.

Johnson objected to two jury instructions that the State proposed. Jury instruction no. 5 stated, "In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated." CP at 40. Jury instruction no. 6 stated, "In order to convict a person of Rape of a Child in the First Degree, it shall not be necessary that the testimony of the alleged victim be corroborated." CP at 41. The trial court noted that the Supreme Court has criticized a similar instruction even though it was a "proper statement of the law." II-B RP at 238. The trial court agreed that it was "not real comfortable with" the instructions but ultimately allowed them because the State had produced some corroborating evidence anyway. II-B RP at 238.

The jury convicted Johnson on two of the counts, and the trial court dismissed the other two counts.

ANALYSIS

I. Judicial Comment on the Evidence Through Instructions

Johnson argues that the trial court improperly commented on the evidence when it instructed the jury that it was not necessary for the alleged victim's testimony to be corroborated in order to convict. We disagree.

Article 4, section 16 of the Washington Constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." An impermissible comment conveys to the jury a judge's personal attitudes toward the merits of a case or credibility of certain testimony. *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004) (citing *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988)). Those attitudes must be "reasonably inferable from the nature or manner of the court's statements." *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999) (quoting *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974)), *cert. denied*, 531 U.S. 837 (2000).

Here, the language in the challenged instructions comes straight from a statute, RCW 9A.44.020(1).[2] It is proper for an instruction to incorporate the language of a statute. *State v. Hoffman*, 116 Wn.2d 51, 103, 804 P.2d 577 (1991); *State v. Hardwick*, 74 Wn.2d 828, 830, 447 P.2d 80 (1968) (court not only may, but should, use the language of the statute, in instructing the jury, where the law governing the case is expressed in the statute). And for that reason, Washington courts have twice held that instructions similar to the one at issue in this case do not

[2] Providing that "[i]n order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." RCW 9A.44.020(1). First degree rape of a child does fall within the scope of chapter 9A.44 RCW. RCW 9A.44.073.

violate article 4, section 16. *State v. Clayton*, 32 Wn.2d 571, 573-74, 202 P.2d 922 (1949); *State v. Zimmerman*, 130 Wn. App. 170, 181-82, 121 P.3d 1216 (2005), *remanded for reconsideration on other grounds*, 157 Wn.2d 1012 (2006). In *Clayton*, the trial court instructed the jury that "a person charged with attempting to carnally know a female child . . . may be convicted upon the uncorroborated testimony of the prosecutrix alone." *Clayton*, 32 Wn.2d at 572. The Supreme Court held that this instruction did not violate article 4, section 16 because it was a proper statement of the law[3] and "expressed no opinion as to the truth or falsity of the testimony of the prosecutrix, or as to the weight which the court attached to her testimony." *Clayton*, 32 Wn.2d at 573-74. Similarly, in *Zimmerman*, we upheld an instruction stating, "In order to convict a person of the crime of child molestation as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated." *Zimmerman*, 130 Wn. App. 173-74.

Johnson argues that *Clayton* is distinguishable because the instruction in that case included the following language:

> That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Clayton, 32 Wn.2d at 572. Johnson reasons that in this case, the absence of any instruction that "the issue of credibility was a question of fact for the jury to determine" "left the jury to infer that the trial court was favorably commenting on the credibility of the complaining witness." Br. of Appellant at 13-14. But the trial court did instruct the jury as to its role in a separate instruction:

> In determining whether any proposition has been proved, you should

[3] *See* Laws of 1913, ch. 100 (repealing Rem. & Bal. Code § 2443); *State v. Morden*, 87 Wash. 465, 469, 151 P. 832 (1915).

> consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.
>
> You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

CP at 35. Reading the trial court's instructions as a whole, we can find no meaningful distinction from those in *Clayton* and *Zimmerman*. *See also Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996) (number and specific language of jury instructions are matters left to trial court's discretion).

Johnson also argues that by giving *two* instructions regarding corroboration, the trial court placed undue emphasis on the alleged victim's testimony, thereby "implying to the jury that the court favored" that testimony. Br. of Appellant at 14. He cites *State v. Music*, 79 Wn.2d 699, 489 P.2d 159 (1971), *rev'd on other grounds by Music v. Washington*, 408 U.S. 940, 92 S. Ct. 2877, 33 L. Ed. 2d 764 (1972), for the proposition that an instruction that correctly states the law can nonetheless create undue emphasis and thereby violate article 4, section 16. We are not persuaded. In *Music*, the parties requested that the trial court instruct the jury on the practical sentencing consequences of each potential verdict. *Music*, 79 Wn.2d at 709. The Supreme Court affirmed the trial court's refusal to give those instructions even though they were correct statements of the law because the information was intended to give the jury more factors on which to make its decision. *See Music*, 79 Wn.2d at 710. And because all other factors came

before the jurors in the form of evidence or from their own experience and knowledge, stating the sentencing factors as a matter of *law* placed undue emphasis on them. *Music*, 79 Wn.2d at 710. In short, the "undue emphasis" in *Music* was not through mere repetition of the law as Johnson contends in this case. The *Music* instructions commented on the evidence by essentially adding additional facts into the case; that is not the case here. Rather, the unnecessary repetition of the language from RCW 9A.44.020(1) was mere surplusage that does not in itself require reversal. *See State v. Spiers*, 119 Wn. App. 85, 94, 79 P.3d 30 (2003). We conclude that the trial court did not violate article 4, section 16 by giving instructions 5 and 6.[4]

II. Ineffective Assistance of Counsel

To demonstrate that counsel ineffectively represented him, Johnson must show that (1) his attorney's performance was so deficient that it "fell below an objective standard of reasonableness" and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831, *cert. denied sub nom. Babbs v. Washington*, 129 S. Ct. 278 (2008). On the first prong, we presume that counsel's decisions constituted sound trial strategy. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Thus, Johnson must show that counsel's

[4] Johnson refers to concerns by the Washington Supreme Court Committee on Jury Instructions (Committee) regarding potential jury instructions taken from RCW 9A.44.020(1). The Committee recommends against giving such instructions, reasoning that "[t]he matter of corroboration is really a matter of sufficiency of the evidence," not a "factual problem." 11 Washington Practice: Washington Pattern Jury Instructions Criminal 45.02 cmt. at 833 (3d ed. 2008). While we are inclined to agree with the Committee's recommendation, its reasoning has more to do with whether the instruction is the "applicable" law than whether it violates article 4, section 16. *See State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (instructions must properly inform jury of the *applicable law* and not mislead the jury). We therefore do not consider it.

deficiency was "'so serious as to deprive [him] of a fair trial.'" *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 252, 172 P.3d 335 (2007) (quoting *Strickland*, 466 U.S. at 687). And because he claims that counsel's errors were in failing to object, he must demonstrate not only that the objections would have been meritorious but also that the verdict would have been different if counsel had objected. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

A. Deputy Bull

1. *Opinion on Guilt*

Johnson argues that counsel should have objected when Deputy Bull referred to a "victim interview" that the Juneau Police Department had conducted with Dillon. Br. of Appellant at 23 (emphasis omitted) (quoting I RP at 116). He contends that by indirectly referring to Dillon as a "victim," Bull improperly opined that Johnson was guilty of the rape. Br. of Appellant at 24.

A witness may not offer an opinion regarding the defendant's guilt, either by direct statement or by inference. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such an opinion violates the defendant's "'inviolate'" constitutional right to a jury trial, which vests in the jury "'the ultimate power to weigh the evidence and determine the facts.'" *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (quoting Wash. Const. art. I, § 21, and *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.

Montgomery, 163 Wn.2d at 591 (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

Deputy Bull's references to the "victim interview" conducted by the Juneau police does not constitute an improper opinion on guilt under the circumstances. I RP at 116-17. First, because Dillon had been a complainant to the Juneau police, it was not a comment on Johnson's guilt for them to label her the "victim" for purposes of their investigation and to describe her interview as the "victim interview" in that context. Bull used the words "victim interview" in the same sense; she was merely describing the scope of the past investigation that she had reviewed. In other words, the words do not convey that Bull believed Dillon had actually been raped.[5] And because the testimony did not constitute an improper opinion on guilt, counsel was not deficient in failing to object to it.

2. *Relevance*

Johnson also argues that his counsel was deficient in failing to object to Bull's testimony regarding her experience with investigating child sexual abuse and this case in particular. Essentially his contention is that because Bull did not do any of the investigation herself, her experience was irrelevant.

But even if Johnson is correct that the testimony was not relevant, such errors are harmless unless we find it reasonably probable that they changed the outcome of the trial. *State v.*

[5] In this respect, this case is distinguishable from *State v. Black*, 109 Wn.2d 336, on which Johnson relies. In that case, the State presented expert psychological testimony that the alleged victim suffered from "rape trauma syndrome," which the court held "carrie[d] with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped." *Black*, 109 Wn.2d at 349. Bull gave no such opinion here.

Benn, 161 Wn.2d 256, 266 n.4, 165 P.3d 1232 (2007), *cert. denied*, 128 S. Ct. 2871 (2008). Johnson contends that the error was not harmless because "[t]he obvious meaning to the jury" from Bull's testimony was "that since Deputy Bull was only assigned to cases in which children had been sexually abused, and that since, in the prosecutor and Deputy Bull's opinion, the interview with Kristen Dillon was a 'victim' interview, it must necessarily follow that Kristen was the 'victim' of the defendant's sexual abuse." Br. of Appellant at 27. We disagree that this is the "obvious meaning" of Bull's testimony. Br. of Appellant at 27. We are confident that the jurors understood from Bull's experience and training that she was obligated to investigate cases of *alleged* sexual abuse, not only those cases where abuse has actually occurred. And as discussed above, Bull's reference to Dillon's "victim interview" was not an opinion on guilt. 1 RP at 116. Counsel was not deficient in failing to object.

B. Dr. Dressel

Johnson faults his counsel for failing to object on hearsay grounds to Dr. Dressel's testimony regarding Dillon's statements to her. Specifically, he contends that the statements do not meet the requirements of the exception for statements made for medical diagnosis or treatment under ER 803(a)(4).[6]

We need not consider whether Dr. Dressel's testimony satisfied ER 803(a)(4) because Johnson again fails to establish prejudice. Dr. Dressel's account of Dillon's history had minimal detail and was consistent with Dillon's testimony at trial. Johnson argues that it "had the effect of

[6] Providing an exception to the general hearsay rule for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4).

bolstering Kirsten's credibility in front of the jury," but he also admits that "there was no question as to the identity of the alleged perpetrator" because Dillon had "repeatedly identified the defendant to the police." Br. of Appellant at 34, 36. Under these circumstances, any prejudicial effect was minimal and there is no reasonable probability that the statements changed the trial outcome. Johnson's ineffective assistance claim fails.

III. SAG

In his SAG, Johnson argues several additional grounds, none of which has merit. Some of the issues that he raises are an attempt to relitigate the case, so we do not consider them as the law leaves the ultimate issues of weighing the evidence to the jury. *Montgomery*, 163 Wn.2d at 590. Johnson also claims that his counsel ineffectively represented him by not presenting certain evidence, but he does not establish that his lawyer's decisions were not legitimate trial strategy or tactics. *See Davis*, 152 Wn.2d at 714. Finally, Johnson argues new facts that are not in the record, which we cannot consider. *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206-07, 53 P.3d 17 (2002).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

We concur:

Armstrong, J.

Hunt, J.